Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Application for the Transfer of *De Facto* Control of Leased Spectrum from SprintCom, Inc. to Alaska DigiTel, LLC	ULS Application No. 0003253513
In the Matter of	WT Docket No. 06-114
Applications for the Assignment of Licenses from Denali PCS LLC to Alaska DigiTel, LLC and the Transfer of Control of Interests in Alaska DigiTel, LLC to General Communication, Inc.	

PETITION TO DENY AND OBJECTIONS OF ACS WIRELESS, INC.

I. INTRODUCTION AND SUMMARY

ACS Wireless, Inc. ("ACSW"), in accordance with section 1.9030(e)(1)(iii) and 1.41 of the Commission's rules, hereby petitions to deny and submits objections to Application No. 0003253513 ("Application"), filed by SprintCom, Inc. ("Sprint") and Alaska DigiTel, LLC ("DigiTel") on December 10, 2007, seeking approval of a Long-Term *De Facto* Transfer Lease Agreement ("Lease Agreement").[1] The Application presents substantial and material questions concerning whether the transfer of *de facto* control over this spectrum to DigiTel will advance the public interest, as required under Section 310(d) of the Communications Act of 1934, as amended.[2]

[1] The application was placed on public notice on December 19, 2007. ACSW has submitted this filing in WT 06-114 so that the record on public interest issues raised in that case may continue to accrue, and that the WT 06-114 record may be incorporated in the lease proceeding.
[2] *See* 47 U.S.C. § 310(d).

ACSW urges the Commission to take a hard look at this Lease Agreement. In WT Docket No. 06-114, ACSW raised concerns that General Communication Inc.'s ("GCI's") acquisition of a 78% interest in DigiTel would give GCI the incentive and ability to leverage its power in the wholesale transport market between Alaska and the Lower 48 to restrain competition for Lower 48 carriers' roaming agreements in Alaska.[3] The Commission denied ACSW's request that it condition its approval of the transaction on a bar against GCI's ability to tie wholesale transport service and roaming service.[4] While it acknowledged that tying could result in competitive harms, the Commission found that ACS had failed to provide evidence that the transaction increased the risk of tying in the future.[5] The Commission agreed, though, that if ACSW had evidence at a future date that GCI had engaged in anticompetitive conduct in providing fiber cable capacity, it could bring that evidence back to the Commission and ask that it take remedial action.[6] The Commission said ACSW's analysis of potential competitive harm amounted to unsupported speculation.[7]

ACSW has good cause to believe the Lease Agreement may be evidence of a coordinated arrangement driven by GCI's anticompetitive conduct. To follow through on its representations to ACSW in WT Docket No. 06-114, the Commission should investigate whether the Lease Agreement is directly or indirectly part of an overall

[3] *See e.g.*, Comments/*Ex Parte* Filing and Petition to Intervene of ACS Wireless, Inc., WT Docket No. 06-114, dated July 21, 2006, at i.

[4] *See Applications for the Assignment of Licenses from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc.*, WT Docket No. 06-114, *Memorandum Opinion and Order*, 21 FCC Rcd 14863 (2006), ¶ 104. ("GCI/DigiTel Order")

[5] *Id.*

[6] *Id.* at ¶ 106.

[7] *Id.* at ¶ 104.

arrangement between GCI and DigiTel in which GCI has tied wholesale transport and roaming in a manner that restricted roaming competition.

The Commission has a duty to ensure that GCI and DigiTel do not harm competition through their aligned dealings with carrier customers. The Commission's public interest standard includes a "deeply rooted preference for preserving and enhancing competition in relevant markets...and generally managing the spectrum in the public interest."[8] If the Commission finds that the lease is a product of anticompetitive conduct, it should deny the application and impose conditions to prevent such anticompetitive conduct in the future.

II. BACKGROUND

A. The Application

The applicants have requested Commission approval of a Long-Term *De Facto* Transfer Lease Agreement. Under the Lease Agreement, Sprint will lease to DigiTel 10 MHz of PCS spectrum in the Anchorage, Fairbanks and Juneau-Ketchikan Basic Trading Areas ("BTAs"). Sprint will transfer *de facto* control of the leased spectrum to DigiTel for the duration of the lease term.[9] If the Commission approves the Lease Agreement, DigiTel will have an attributable 40 MHz of PCS spectrum in the subject BTAs.[10] DigiTel will have *de facto* control of Sprint's spectrum, aligning Sprint squarely with the GCI/DigiTel/Dobson ("AT&T") alliance in the marketplace that exists now.

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[8] *See In the Matter of Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-63, Memorandum Opinion and Order, 20 FCC Rcd. 13,967, 13,977 (2005) ¶ 21. ("Sprint/Nextel Order")
[9] Application, Exhibit 1.
[10] *Id.*

B. The Interested Parties

ACSW provides mobile wireless voice and data services to approximately 145,000 subscribers in Alaska, and is the second largest wireless provider in the state.[11] It holds the 800 MHz B-block cellular licenses for Alaska's major communities, as well as several 10 MHz E-block PCS licenses that combined cover the entire state, including Anchorage, Fairbanks, Juneau, and the Kenai Peninsula.[12] In 2002, it purchased 10 MHz F-block PCS licenses covering Fairbanks and Juneau.[13] In Anchorage, ACSW's largest telecom market, ACSW offers basic wireless service as well as a number of advanced mobile data and broadband services. ACSW competes directly against DigiTel in mobile telephony in a number of markets throughout Alaska, including in the Anchorage, Fairbanks and Juneau areas covered by the lease.[14]

DigiTel is a limited liability company that provides wireless services to subscribers in and around Anchorage, Fairbanks, Juneau and a number of smaller communities.[15] It holds 15 MHz of the A-block broadband PCS license, with a coverage area over the entire State of Alaska, and a 20 MHz license covering St. Paul Island.[16]

GCI owns a 78% interest in DigiTel.[17] GCI describes itself as "the leading integrated, facilities-based communications provider in Alaska."[18] GCI is the only carrier owning redundant undersea fiber optic cable lines from Alaska to the Lower 48, offering fully protected, geographically diverse routing of transport service that is especially

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[11] Declaration of Robert Doucette, attached as Exhibit A ("Doucette Declaration"), at 2.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] GCI/DigiTel Order, ¶ 2.
[16] *Id.*
[17] The Commission approved the transaction in the GCI/Digitel Order at ¶ 1.
[18] *See* General Communication Inc., 2006 SEC Form 10-K, p. 8.

attractive to other common carriers, the military and large commercial users.[19] Through various subsidiaries, GCI holds the 30 MHz B-Block broadband PCS license for the Alaska Major Trading Area, which covers the entire territory of the state, as well as other SMR and microwave licenses.[20]

Sprint is a Lower 48 carrier that terminates telecommunications traffic in Alaska. Sprint relies on other Alaska-based carriers to transport its traffic from the Lower 48 to the state and to backhaul that traffic within the state. Sprint holds the 10 MHz D Block PCS license with a coverage area that includes the BTAs in the Lease Agreement.[21]

III. DISCUSSION

A. Introduction

The applicants bear the burden of proving by a preponderance of the evidence that approving the lease agreement and transfer of *de facto* control over Sprint's Alaska spectrum to DigiTel will serve the public interest, as required by sections 214(a) and 310(d) of the Act. The applicants offer only cursory public interest arguments, claiming that the Agreement will allow DigiTel to "expand the robustness of its wireless network".[22] Substantial questions exist, however, as to whether GCI's anticompetitive conduct played a role in the transaction. The Lease Agreement may be the product of an arrangement where GCI effectively tied its wholesale transport to roaming arrangements for Sprint, a customer that needed transport of traffic both to and within Alaska. The

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[19] *See* "GCI: A unique communication company in a unique market." at 4. http://www.gci.com/investors/investbroch.pdf, last viewed Jan. 2, 2008.
[20] GCI/DigiTel Order, ¶ 4.
[21] *Id.* at ¶ 55.
[22] Application, Exhibit 1.

Commission should take a hard look at the circumstances that gave rise to the Lease Agreement to ensure that approval will advance the public interest.

B. ACSW Raised the Risk in WT 06-114 that GCI's Acquisition of 78% of DigiTel Would Give it the Ability to Restrict Competition in the Roaming Market

ACSW saw a real risk that GCI's acquisition of 78% of DigiTel would give GCI the incentive and ability to leverage its power in the wholesale transport market to restrict competition for Lower 48 carriers' roaming agreements in Alaska. GCI owns two of the three undersea fiber optic cables that connect Alaska to the Lower 48, the Alaska United East and Alaska United West (non common carrier) submarine cables.[23] Consequently, GCI is the *only* fiber cable owner that can offer *redundant* (two), fully protected, geographically diverse transport facilities to and from the Lower 48. Lower 48 carriers like Sprint generally rely on existing undersea fiber optic cable facilities to transport their traffic to and from Alaska, rather than constructing their own fiber to the State.[24]

ACSW saw clear risks that GCI could leverage its market power in the transport market to restrict competition in roaming.[25] Through DigiTel, GCI could enter the roaming market for the first time as a facilities-based carrier.[26] GCI would be in a position to coordinate with DigiTel such that the "two" entities could offer roaming and wholesale transport services to Lower 48 carriers together in an anticompetitive manner and restrict competition.[27] GCI could leverage this market power to harm competition in the related roaming market, since Lower 48 carriers need both services to complete

[23] GCI/DigiTel Order, ¶ 96.
[24] Declaration of Doucette at ¶ 5.
[25] *See e.g.*, Comments/*Ex Parte* Filing and Petition to Intervene of ACS Wireless, Inc., WT 06-114, dated July 21, 2006, at 10.
[26] *Id.* at 13.
[27] *Id.* at 13-14.

customers' calls to and from Alaska. Contracts with Lower 48 carriers are very strategically important, because they can generate some of the highest traffic volume in the market.

As ACSW noted, GCI could use multiple strategies to restrict competition by tying the two services.[28] For example, GCI could offer carriers a "sweetheart" deal on roaming if they also used GCI for wholesale transport. Further, GCI could anti-competitively tie wholesale transport and roaming through coercion, below-cost pricing of either transport or roaming services, in contract negotiations and through deals offered to integrated wireline and wireless carriers. Even if GCI did not *require* carriers to take its roaming services to gain access to its redundant transport services, it could effectively coerce carriers away from competitors' roaming services by offering below-cost transport prices. The Commission found ACSW's concerns speculative, but assured ACSW that if it had evidence of GCI's anticompetitive conduct using its fiber cable capacity later, it could bring this evidence to the Commission for further investigation.[29]

C. The Lease Agreement May be the Product of GCI's Anticompetitive Practices

The Lease Agreement may be a product of these anticompetitive practices. Evidence of possible coordinated conduct between GCI and DigiTel in their transport and roaming arrangements with Sprint provides just cause for investigation.

Last year, Sprint was set to terminate a substantial part of its arrangement with DigiTel. Sprint had notified DigiTel that the Sprint/DigiTel Service Agreement would expire on December 15, 2006.[30] The Commission found no basis to attribute Sprint's

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[28] *Id. See also* GCI/DigiTel Order, ¶ 99.
[29] GCI/DigiTel Order, ¶ 106.
[30] *Id.* at ¶ 57.

spectrum to GCI since it expected the Sprint/DigiTel relationship to diminish in the future.[31]

Instead, Sprint and DigiTel negotiated a new arrangement that expanded the relationship. DigiTel will actually gain *de facto* control over Sprint's spectrum in the major metropolitan areas of Alaska. Not only will DigiTel carry Sprint's traffic in Alaska, but it will actually control Sprint's spectrum. DigiTel could certainly use Sprint's spectrum for Sprint's roaming traffic,[32] particularly since DigiTel said that the lease will "expand the robustness"[33] of its network. Therefore, while the Commission had expected DigiTel's relationship with Sprint to decrease after December 15, 2006, that relationship actually expanded significantly.

At the same time, GCI appears to have continued or extended its arrangement with Sprint to terminate its Lower 48 traffic in Alaska. According to GCI's SEC filings, GCI and Sprint entered a contract for Alaska Access Services that was effective March 12, 2002 and was amended on July 24, 2002 regarding termination points in the State of Alaska.[34] The term of the transport contract, and the date on which it was last renegotiated, are not publicly available. However, ACS understands that GCI currently transports Sprint's traffic from the Lower 48 over its fiber cable facilities.[35]

GCI could have coordinated negotiations on Sprint's wholesale transport contract directly or indirectly with negotiations on Sprint's roaming and backhaul agreements in a

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[31] *Id.*
[32] Declaration of Doucette at ¶ 9.
[33] Application, Exhibit 1.
[34] *See* General Communication Inc., 2006 Form 10-K/A, Exhibit 10.121.
[35] Declaration of Doucette at ¶ 12.

manner that restricted competition in the major Alaska roaming markets.[36] The Lease Agreement may be a key part of the overall arrangement, since DigiTel can use the leased spectrum to enhance its capacity to carry Sprint's roaming traffic. These assertions are more than mere speculation because they are based on the facts and circumstances of Sprint's service in Alaska.

IV. THE COMMISSION SHOULD INVESTIGATE WHETHER THE LEASE WAS THE PRODUCT OF ANTICOMPETITIVE CONDUCT

The Commission should take a hard look at the Lease to ensure that approving DigiTel's control over Sprint's Alaska spectrum will advance the public interest. Under Section 309(d) of the Act, the Commission's public interest standard includes a "deeply rooted preference for preserving and enhancing competition in relevant markets."[37] If the Lease Agreement was directly or indirectly a product of anticompetitive practices, approval will sanction anticompetitive conduct in the major roaming markets of Anchorage, Fairbanks and Ketchikan-Juneau.

ACSW has submitted evidence of coordinated practices between GCI and DigiTel regarding Sprint's transport needs both to and within Alaska. The Commission has a duty to investigate whether the coordination included anticompetitive practices that harmed competition in the roaming markets. The evidence creates a strong inference of coordinated conduct, and is sufficient cause for investigation. ACSW cannot itself prove anticompetitive conduct, and must rely on the Commission to police possible anticompetitive practices regarding communications facilities. ACSW is not directly involved in GCI's negotiations with Sprint, and it cannot divulge information that it

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[36] Declaration of Doucette at ¶ 13.
[37] *Sprint-Nextel Order*, 20 FCC Rcd. at 13977 ¶ 21.

learns in confidential communications. Its concerns are so serious, though, that is has taken the extraordinary step of deciding to construct its own fiber optic cable to the Lower 48, at a cost of millions of dollars, so that it can compete against GCI's transport quasi-monopoly with its own transport facilities.

The Commission should ask Sprint to submit agreements that may be directly or indirectly related to the lease transaction for review. These should include Sprint's Lease Agreement and Roaming Agreements with DigiTel, and any other agreements related to the Sprint/DigiTel arrangement. The Commission should also ask Sprint to submit any contracts with GCI for termination of its Lower 48 traffic in Alaska and any other agreements related to the GCI/Sprint arrangement. The Commission should take other action necessary to the investigation, which could include conducting an evidentiary hearing.

V. CONCLUSION

The application presents substantial and material questions concerning whether the *de facto* transfer of control of Sprint's spectrum to DigiTel will advance the public interest, as required under Section 310(d) of the Act. The Commission should take a hard look at the Lease Agreement, to determine whether it relates directly or indirectly to any anticompetitive conduct by GCI in providing wholesale transport to Sprint to terminate its Lower 48 traffic in Alaska. It should take all actions necessary to conduct this investigation fully, including requiring Sprint to file any agreements it has with DigiTel concerning its use of DigiTel's facilities in Alaska,[38] and with GCI concerning its use of

[38] All confidential documents provided to ACSW in WT 06-114 have been destroyed.

GCI's wholesale transport facilities between Alaska and the Lower 48, as well as conduct an evidentiary hearing.

Dated this 2nd day of January, 2008.

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Exhibit A

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DECLARATION OF ROBERT DOUCETTE

I, Robert Doucette, hereby state, under penalty of perjury as follows:

1. I am the Director of Corporate Strategy for ACS Holdings, the parent company of ACS Wireless, Inc. ("ACSW"). I am responsible for assessing the Alaska telecommunications market and developing ACSW's long-term strategy.

2. ACSW provides mobile wireless voice and data services to approximately 145,000 subscribers in Alaska, and is the second largest wireless provider in the state. It holds the 800 MHz B-block cellular licenses for Alaska's major communities, as well as several 10 MHz E-block PCS licenses that combined, cover the entire state including Anchorage, Fairbanks, Juneau, and the Kenai Peninsula. In 2002, it purchased 10 MHz F-block PCS licenses covering Fairbanks and Juneau. ACSW competes directly against Alaska DigiTel ("DigiTel") in mobile telephony in several markets throughout Alaska, including in Anchorage, Fairbanks and Juneau.

3. SprintCom, Inc. ("Sprint") and Alaska DigiTel, LLC ("DigiTel") have entered into a long term *de facto* transfer lease. Sprint will lease to DigiTel 10 MHz of PCS spectrum in

the Anchorage, Fairbanks and Juneau-Ketchikan Basic Trading Areas ("BTAs") and transfer *de facto* control of the leased spectrum to DigiTel for the duration of the lease term.

4. ACSW believes that DigiTel's lease for Sprint's spectrum could be directly or indirectly the product of conduct by General Communication, Inc. ("GCI") that restricted competition in the roaming markets of these BTAs. In WT Docket No. 06-114, ACSW raised that GCI's acquisition of a 78% interest in DigiTel and the resultant concentration of spectrum would give GCI the ability to leverage its market power in the wholesale transport market between Alaska and the Lower 48 to restrain competition in the roaming market. With the bulk of Alaska's population located in the Anchorage, Fairbanks and Juneau-Ketchikan areas, these markets present potent business opportunities for GCI to leverage market power effectively against competitors and wireless subscribers.

5. A number of Lower 48 carriers, including Sprint, purchase undersea fiber optic cable transport between Alaska and the Lower 48 rather than construct their own fiber facilities. Carriers purchase fiber cable facilities as the best means of transport for a number of reasons. Fiber is the preferred method of carrying voice, video, or data communications because of its lack of latency. Compared to satellite, fiber has greater security, reliability, and service quality. For example, fiber can provide far superior error-checking protocols.

6. Between Alaska and the Lower 48, there are no other comparable transport options. None of the "alternate" facilities the Commission identified on this route in its order in WT Docket No. 06-114 provide the quality of service, and reliability needed to serve customers like Sprint. Satellite facilities between Alaska and the Lower 48 are of limited value on this route to carrier customers. Satellite latency periods can significantly disrupt data communications for carrier customers' end users. Also, because data transmissions require significant amounts of bandwidth, satellite services can be cost prohibitive. Canadian common

carrier terrestrial microwave facilities between Alaska and Canada (such as Alascom's facilities that provide transborder links to Canada) do not provide comparable transport options due to reliability and capacity constraints.

7. Redundant fiber transport services would be particularly important to Sprint. Carriers need redundant facilities to transport their end users' voice and data private line traffic, such as banking, military, or other transmissions that require the most secure and reliable transport. Carriers also need redundancy for mobile data traffic. Both private line and mobile data services are particularly important growth markets for carriers.

8. Because GCI owns two of the three undersea fiber-optic cables between Alaska and the Lower 48, it controls the majority of facilities on the wholesale transport route and has a monopoly on redundant facilities. Even if Sprint used the third fiber owned by Crest Communications, LLC, it would still need to contract with GCI to have redundant transport.

9. Lower 48 wireless carriers such as Sprint also generally rely on carriers in Alaska to carry their subscribers' calls within the state, including through roaming arrangements. ACSW and DigiTel compete to offer roaming arrangements to wireless carriers from the Lower 48.

10. In WT Docket No. 06-114, ACSW showed that if GCI acquired a 78% interest in DigiTel, it would be able to enter the roaming market for the first time as a facilities-based carrier. ACSW saw real risks that GCI would be able to coordinate with DigiTel such that the carriers could offer roaming and wholesale transport services to Lower 48 carriers together in an anticompetitive manner to restrict competition.

11. ACSW believes that the Lease Agreement may be directly or indirectly related to anti-competitive practices by GCI. Sprint had given notice to DigiTel that it was terminating its Service Agreement with DigiTel effective December 15, 2006. Terminating the parties' service

arrangement would represent a substantial diminishing of their relationship. Instead, DigiTel has actually expanded its relationship with Sprint through the Lease Agreement. DigiTel will have *de facto* control over Sprint's spectrum in the major metropolitan markets of Alaska.

12. At the same time, GCI has apparently continued or extended its relationship with Sprint to carry its Alaska-terminating traffic on GCI fiber cable transport facilities.

13. I can see, due to the timing and continuations/extensions of these relationships, that GCI and DigiTel could have coordinated negotiations with Sprint to tie wholesale transport and roaming. The Lease Agreement may be part of such coordination, since DigiTel certainly could certainly use Sprint's leased spectrum to carry its roaming traffic.

14. I have reviewed the attached Petition to Deny and Objections of ACS Wireless, Inc. ("ACSW Petition"). All facts set forth in the ACSW Petition are true and correct to the best of my knowledge.

Executed this 2nd day of January, 2008.

Robert Doucette
Director of Corporate Strategy
ACS Holdings

CERTIFICATE OF SERVICE

I, Elisabeth H. Ross, hereby certify that copies of the **Petition to Deny and Objections of ACS Wireless, Inc.** and attachment, were served this 2nd day of January, 2008 via U.S. first class mail, postage prepaid and via email, upon the following:

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